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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 162

HOMER GLEN WILCOX, PETITIONER

v.

LIEUTENANT GENERAL J. L. DE WITT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the United States District Court for the Southern District of California (R. 215–303) are reported at 67 F. Supp. 339, *sub nom. Wilcox* v. *Emmons*. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 324–339) is reported at 161 F. 2d 785.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 28, 1947 (R. 340). The petition for a writ of certiorari was filed June 28, 1947. The jurisdiction of this Court is invoked

under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the order of respondent in the instant case, excluding petitioner from vital defense areas, was valid.

2. Whether respondent could lawfully enforce the exclusion order by the use of military personnel.

3. Whether, assuming *arguendo* that either the exclusion order or the method employed for its enforcement were invalid, respondent may be held personally liable in damages in the circumstances of the instant case.

STATUTE AND EXECUTIVE ORDER INVOLVED

The statute and Executive Order involved are set forth in the Appendix, *infra,* pp. 30–32.

STATEMENT

Petitioner brought suit against respondent, the Military Commander for the Western Defense Command,[1] seeking damages against respondent in his personal capacity for the alleged illegal removal of petitioner from California through the use of troops (R. 2–11). After answer both parties moved for summary judgment (R. 215).

[1] The Western Defense Command embraced the States of California, Oregon, Washington, Idaho, Montana, Utah, Nevada, and Arizona (R. 216).

The facts found by the District Court (R. 216–296)[2] may be summarized as follows:

For some time prior to December 17, 1942, there had been under consideration the question whether petitioner should be excluded from certain areas of the Western Defense Command as a potentially dangerous individual (R. 230–238). On that date, petitioner, together with certain other persons, was indicted by the Federal Grand Jury for the Southern District of California under the provisions of Section 4 of the Act of June 15, 1917, c. 30, 40 Stat. 217, 219, 50 U. S. C. 34, for conspiracy to commit sedition (R. 238). On December 28, 1942, acting pursuant to the authority conferred on him by Executive Order 9066 (Appendix, pp. 30–32), respondent, after a study of reports of intelligence agencies concerning the petitioner, the testimony before an Individual Exclusion Hearing Board, the appraisals and recommendations made by the Board, by other staff sections and officers, and by the United States District Attorney for the Southern District of California, issued Exclusion Order V–7 addressed to the petitioner (R. 239–240).

That order provided that ten days after its receipt by petitioner he was prohibited from being in, remaining in, or entering Military Areas

[2] The adequacy and correctness of these findings were not challenged by either party on the appeal in the court below, and are not raised by the petition herein either in the questions presented or by way of specification of errors.

Nos. 1 and 2, Western Defense Command (comprising the States of Arizona, California, Oregon, and Washington), as well as certain states along the Atlantic coastline, and the Gulf of Mexico (R. 240–242). The exclusion order was served on petitioner on January 22, 1943 (R. 243). At the same time he was served with another document, dated January 14, 1943, staying the enforcement of the exclusion order, and permitting him to remain in Military Areas Nos. 1 and 2 under certain security conditions pending the conclusion of the criminal case,[3] but requiring him to leave such areas at the conclusion thereof, irrespective of its outcome (R. 243–246). On May 6, 1943, petitioner was convicted of conspiracy to commit sedition and was sentenced to serve five years in a federal penitentiary (R. 248). On May 10, 1943, petitioner filed notice of appeal to the Circuit Court of Appeals for the Ninth Circuit and, upon application to the District Court, was released on bail pending such appeal (R. 248–249).[4]

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[3] Petitioner was a party to three proceedings, all of which have a bearing on the instant case. The first was the criminal case for conspiracy to commit sedition; the second was an action to enjoin the present respondent from enforcing the exclusion order; and the third is the instant action seeking damages. For the sake of brevity and ready identification they are hereinafter referred to as the criminal case, the injunction case, and the damage case.

[4] Petitioner's conviction was recently reversed in *Bell* v. *United States*, 159 F. 2d 247 (C. C. A. 9), on the authority

Meantime, on March 25, 1943, petitioner filed suit in the District Court for the Southern District of California against General DeWitt and others, setting forth two causes of action (R. 246). The first cause of action sought a judgment declaring that the exclusion order and the stay order were both void and unconstitutional and restraining enforcement of the orders "directly or indirectly by any means, method or device whatsoever;" the second sought to recover damages in the sum of $50,000 and exemplary damages in the sum of $5,000 (R. 246–247). Petitioner did not leave Military Areas Nos. 1 and 2 after he was convicted in the criminal case, but, since the injunction suit was still pending, General DeWitt on May 29, 1943, further stayed enforcement of the exclusion order until the conclusion of the trial of the injunction case on conditions which were substantially the same as those contained in the stay order of January 22, 1943 (R. 254–255).

Following a preliminary hearing in the injunction suit, the court, on May 20, 1943, filed a "Memorandum of Conclusions," summarizing the case and concluding that the defendants were not liable in damages to petitioner, denying the application for an injunction *pendente lite,* and

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of the decision of this Court in *Ballard* v. *United States*, 329 U. S. 187, holding invalid an indictment returned by a grand jury whose panel did not include women.

setting the case down for early trial on the merits (R. 250–253). On the same day, and prior to the filing of the Memorandum of Conclusions, the petitioner, with the approval of the court, dismissed without prejudice his claim for damages (R. 253).

About this time—after petitioner's conviction in the criminal case, but before the granting of the stay in consequence of the injunction case—respondent had asked the War Department to request the Department of Justice to prosecute petitioner under Public Law 503—the Act of March 21, 1942, c. 191, 56 Stat. 173, 18 U. S. C., Supp. V, 97a (Appendix, *infra*, p. 30)—for refusing to comply with the exclusion and stay orders (R. 249). That request was conveyed to the Attorney General by letter dated May 18, 1943 (R. 249). The Department of Justice advised the War Department that it did not intend to institute criminal proceedings against petitioner for violation of the 1942 Act because that violation was a misdemeanor only, carrying a maximum sentence of one year, and petitioner had already been convicted of a felony, and had been sentenced to five years' imprisonment upon facts which, in the Department's opinion, were essentially the same as those upon which the exclusion order was based (R. 255–256). On July 30, 1943, respondent was again advised by the Department of Justice that it would not prosecute petitioner under the Act of March 21, 1942, even though he

should continue to violate the exclusion order, if the District Court held the order to be valid (R. 257). On the same day, the War Department authorized respondent to remove petitioner by the use of military personnel, by force if necessary, provided the court's decision in the injunction case was favorable to the defendants (R. 257). Both the Attorney General and the Judge Advocate General of the Army had previously advised that, if the military authorities believed recalcitrant excludees to be sufficiently dangerous to the military security of military areas, they had the express power to exclude them by force under Executive Order 9066 (R. 248, 254; see also R. 109, 111–112).[5]

Thereafter, on August 1, 1943, respondent instructed the Commanding General, Southern California Sector, Western Defense Command, that if the court should uphold the validity of the exclusion order and petitioner should continue to violate such order, he should be escorted out of the prohibited areas under military guard (R. 257–263).

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[5] Executive Order 9066, *infra*, p. 32, provided in part:

"I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies."

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The injunction case then came on for trial. At the conclusion of the trial, the district court on September 4, 1943, entered an order denying an injunction, and filed a memorandum which stated in part (R. 264–265):

> Taking into consideration the record in its entirety we cannot say that the Commanding General did not have ground for believing that plaintiff had committed acts of disloyalty, that he had engaged in a kind of leadership which might instigate others to carry on activities which would facilitate the carrying on of espionage and sabotage, and that his continued presence in the area from which he had been ordered excluded constituted a danger to the military security thereof.
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> * * * * *
>
> Accordingly we conclude that plaintiff's application for an injunction must be denied, and that this suit must be dismissed. Likewise we are convinced that plaintiff without further delay should obey the Exclusion Order directed against him, as this Court will do nothing which might seem to interfere with the enforcement of such Order.[6]

Thereafter, the District Court filed findings of fact and conclusions of law (R. 270–282). The District Court specifically found:

> That the individual exclusion order was

[6] Notice of appeal was filed on November 22, 1943 (R. 285).

issued by Lt. Gen. John L. DeWitt after a study by him of the reports of intelligence agents of the United States Government, the information received from the questionnaire filed by plaintiff with the Board, the testimony of the Board hearing on November 3, 1942, and the appraisals and recommendations made by the Board, by other staff officers, and by the United States District Attorney for the Southern District of California. The administrative file (Defendant's Exhibit D), the material contained in which was uncontradicted at the trial, shows that Wilcox at the time of the issuance of the order was the San Diego County Supervisor of "Mankind United," an organization which is opposed to the present war. The file shows that at meetings held in various parts of Southern California within Military Area No. 1 and after the entrance of the United States into war, the plaintiff made speeches and urged action by his hearers, the extent and nature of which may be summarized as follows: The war is being fought for the "war lords" who are prolonging it for their profit. War bonds should not be purchased as the war will thereby be prolonged. Defense workers who are building warplanes and war implements should realize that such equipment will be used against them, "Mankind United" will be able to stop the war by striking at the manufacture of war equipment and destroying munition dumps.

People should not enlist in first aid courses. Dimout regulations, gasoline and rubber rationing were unnecessary and were merely an effort on the part of the Government to curtail the liberties of the people. (Finding XIX, R. 277–278.)

* * * * *

That the evidence concerning plaintiff's activities and associations provided a reasonable ground for the belief by defendant, Lt. Gen. John L. DeWitt, that plaintiff had committed acts of disloyalty and was engaged in a type of subversive activity and leadership which might instigate others to carry on activities which would facilitate the commission of espionage and sabotage and encourage them to oppose measures taken for the military security of Military Areas Nos. 1 and 2, and that plaintiff's presence in the said areas from which he had been excluded would increase the likelihood of espionage and sabotage and would constitute a danger to the military security of those areas. It was, therefore, a reasonable precaution, in the light of the said dangers, to exclude plaintiff from Military Areas Nos. 1 and 2. (Finding XXII, R. 278–279.)

That the exclusion procedure adopted by the defendant, Lt. Gen. John L. DeWitt, was designed to protect the vital war industries, lines of communication, military installations and resources located within Military Areas Nos. 1 and 2 of the Western

> Defense Command, and was appropriate for that purpose. Individual exclusions of those persons who are deemed to be potentially dangerous to the security of designated military areas is a recognized military procedure designed and appropriate for the purpose of safeguarding military areas against potential sabotage and espionage and other subversive activity. (Finding XXIII, R. 279.)

And the District Court concluded as a matter of law (R. 281–282)—

> The Individual Exclusion Order No. V–7 directed to plaintiff was not issued arbitrarily, was made in good faith, was dictated by adequate reasons of military necessity, and was a reasonable and appropriate means to prevent espionage and sabotage and to preserve the military security of said Military Areas Nos. 1 and 2. (Conclusion IX.)
>
> The said Exclusion Order is legally and constitutionally valid both from the standpoint of substance and procedure. (Conclusion X.)

Immediately after receiving notification that the injunction had been denied, respondent notified the Office of the Assistant Secretary of War by telephone of the court's decision and stated that he was ready to proceed with the removal of petitioner by use of military personnel (R. 265). Respondent was then advised by the Assistant Secretary of War, Mr. McCloy, to proceed

to remove petitioner by use of troops, and this authorization was given with the approval of the Secretary of War, Mr. Stimson, and the Chief of Staff, General Marshall (R. 265–266). Acting pursuant to the authorization from the War Department, respondent, on September 6, 1943, directed that petitioner be escorted from the prohibited area of the Western Defense Command by military personnel (R. 266–267). Petitioner was thereupon apprehended and, without personal violence, was removed to Las Vegas, Nevada, a destination which he had selected (R. 268–269).

The policy of the Commander of the Western Defense Command was to review exclusion cases periodically. The matter of petitioner's exclusion was reconsidered by Lt. General Emmons, who, on September 17, 1943, had succeeded respondent as Commander of the Western Defense Command, and who, on November 27, 1943, ordered that the exclusion order be continued in effect (R. 269, 285–286). On January 15, 1944, Lt. General Emmons, after further consideration of petitioner's case, suspended the exclusion order, and on January 18, 1944, petitioner was advised that he might return to the State of California, which he did on January 20, 1944 (R. 286–287). On March 22, 1944, Exclusion Order V–7 was rescinded by Lt. General Emmons in the light of the then existing conditions (R. 287).

Thereafter, on June 1, 1944, a stipulation was filed with the Circuit Court of Appeals in the in-

junction case, in which counsel for the parties stipulated that "the appeal pending herein be dismissed upon the following terms and conditions, to-wit, without prejudice to any new or further proceedings arising out of appellant's expulsion from the State of California, as involved herein; and that said appellant will pay costs and to the Clerk of the court any fees that may be due to him" (R. 287–288). The order of the court dismissing the appeal in accordance with the terms of the stipulation was entered on July 31, 1944 (R. 289–290; *Wilcox* v. *DeWitt,* 144 F. 2d 353).

On September 5, 1944, petitioner instituted the instant action, alleging that his removal by respondent was illegal both on the ground that the exclusion order, on which the removal was based, was invalid, and on the ground that respondent, in any event, lacked authority to compel his removal through the use of troops (R. 2–11, 290). The complaint asked damages in the sum of $3,500, but subsequently petitioner filed a waiver of all damages in excess of $100 (R. 83, 291, 296, 303). On July 29, 1946, the District Court filed its findings of fact and conclusions of law (R. 215–303), and gave judgment for petitioner in the sum of $100 (R. 304–305). The court concluded that the judgment in the earlier injunction case was *res judicata* as to the question of the validity of the exclusion order (R. 297–299). The court decided, however, that Public Law 503

provided the sole means for the enforcement of the exclusion order and that respondent did not have lawful power or authority to exclude petitioner from Military Areas Nos. 1 and 2 by the use of military personnel (R. 299).

On appeal, the judgment of the District Court was reversed and the cause was remanded with instructions to enter a judgment for respondent (R. 340). The Circuit Court of Appeals held that the exclusion order was valid and that respondent could lawfully use military personnel in enforcing it (R. 324–339).

ARGUMENT

Petitioner is one of five persons as to whom individual exclusion orders under Executive Order 9066 and the Act of March 21, 1942, were issued and against whom such orders were enforced through the use of military personnel (R. 107). So far as we are aware, this is the only action for damages which is in or which can now be brought into litigation. The case is therefore *sui generis*. Moreover, the circumstance that, after bringing suit for $3500 (R. 11), petitioner subsequently stipulated that he would waive all damages over $100 (R. 83, 291, 296), strongly suggests that the object of this proceeding for damages was not so much redress for injuries sustained as the obtaining of abstract pronouncements from the courts as to respondent's authority. This he cannot have. We think that, moreover, he cannot have damages, since respondent, having removed

petitioner from a combat zone (R. 217) in good faith, with the approval of his superiors, in reliance on a judicial determination of the validity of his action, and in a manner not palpably beyond his authority, cannot in any event be made personally liable.

Not only is the case therefore unique, but in its essentials it turns on a question of fact, viz., whether there was a rational basis for the order of exclusion. If there was, then the decisions of this Court establish the validity of the order. *Hirabayashi* v. *United States,* 320 U. S. 81; *Korematsu* v. *United States,* 323 U. S. 214. Rationality is, of course, purely factual; and in this instance it has been found in two separate litigated proceedings that the order did have a rational basis (R. 278–279, 281–282, 337–338; cf. R. 299–300.)

The only point decided adversely to General DeWitt in the entire litigation was the holding of the district court in the present case that he was not authorized to use military personnel to enforce the order of exclusion. This holding, directly contrary to the decision in the *Korematsu* case that "The power to exclude includes the power to do it by force if necessary" (323 U. S. at 223), was promptly and properly reversed by the court below.

Three courts, moreover, have found and held that respondent acted throughout in complete good faith (R. 281–282, 295–296, 299–300, 332),

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with the approval of his civil and military superiors in the War Department (R. 281, 254, 257, 265–266, 266–267, 336–337) and on the advice of authoritative civil and military legal advisers (R. 277; R. 248, 254). It is not challenged that petitioner was removed only after a federal court had refused to enjoin such removal on the ground, *inter alia,* that the exclusion order was "legally and constitutionally valid both from the standpoint of substance and procedure" (R. 282).

In these circumstances we submit that the judgment below does not now present any question calling for further review by this Court.

1. *Respondent had authority to enforce the exclusion order through the use of military personnel.*—In this aspect, the case presents a simple statutory question: Did the enactment of the Act of March 21, 1942, withdraw the power conferred by Executive Order 9066, wherein the President authorized and directed the military commanders therein specified "to take such other steps as * * * the appropriate Military Commander may deem advisable to enforce compliance * * * including the use of Federal troops"?

The district court's holding that the criminal penalty contained in the 1942 Act operated to limit the military commander's powers to use physical or military force, and that that Act was intended to be an exclusive means of enforcement (R. 299) is in square conflict with decisions of this Court. In *Hirabayashi* v. *United States,* 320

U. S. 81, 91, 92, 103, it was expressly held, after a careful review of the legislative history, that Congress by the Act of March 21, 1942, had ratified and confirmed Executive Order No. 9066. Inasmuch as that Executive Order specifically provided for enforcement through the use of troops, it necessarily follows, as was held in the *Korematsu* case, that "The power to exclude includes the power to do it by force if necessary" (323 U. S. at 223). Thus the judgment of the district court here made the respondent liable in damages for doing what this Court specifically said he was empowered to do. The court below was consequently right in holding, after a further review of the legislative history (R. 330),[7] that Congress by

[7] The intention of Congress to supplement respondent's power of exclusion is apparent from the following discussion in the House concerning the bill which became Public Law 503 by Congressman Sparkman, a member of the Committee on Military Affairs which reported out the bill recommending its passage, and Congressman Michener (88 Cong. Rec. 2730; R. 330):

"Mr. SPARKMAN. Reserving the right to object, Mr. Speaker, may I say that while our committee was out on the West Coast studying this problem, one of the first things General DeWitt called to our attention was the fact that even though he was given the authority to declare these to be restricted and prohibited areas, he had no way of enforcing the order by penalty, if anyone violated it. All he could do was to move them off. If they came back, there was no penalty provided in the law. He asked for this specific legislation. It is needed immediately because that evacuation is taking place now.

"Mr. MICHENER. Yes; that is in exact harmony with my first statement, that this bill simply implements the Executive Order which is now in force and effect."

passing the Act of 1942 implemented the Executive Order by adding a new method of enforcement, and that this legislation did not take away the military commander's power, already his under the Executive Order, of using troops to enforce removal (R. 332).

In view of the clear purpose of the statute, it is not necessary to belabor the point that the holding of the district court as to the effect of the statute would frustrate the very end of the removal order. But it is pertinent to call attention to the observation of the court below as to the consequences of the district court's holding (R. 328–329):

> It is apparent that a person ordered excluded or a returned excludee, during the period of a misdemeanor prosecution, would be entitled to bail and that he would be at large in the defense area and thus be free to exercise his subversive activities. * * * It cannot be that General DeWitt or Congress thought it an efficient protection for the war menace apprehended from disloyal persons in these thousands, that they would remain for months out on bail during the prosecution of a myriad of misdemeanor suits, crowding out all other litigation from our federal courts.

And, contrary to petitioner's intimation (Pet. 33), there was here no summary seizure and ouster by troops to forestall a test of the validity of the exclusion order. That order was first stayed pending the conclusion of the criminal

case. Even after petitioner had been found guilty by verdict of the jury in that case, the order was further stayed until the conclusion of the trial in the injunction case. Not until the district court in the latter case had refused to enjoin the enforcement of the exclusion order, with a holding that that order "is legally and constitutionally valid both from the standpoint of substance and procedure" (R. 282), did respondent proceed to effect petitioner's removal.[8]

2. *The exclusion order was valid.*—The validity of the exclusion order directing petitioner's removal from a combat zone (R. 217) depends under the decisions of this Court on what is inescapably a question of fact, viz., whether there was a rational basis for respondent to believe, in the exercise of an informed judgment, that petitioner's removal was reasonably necessary to prevent danger of espionage and sabotage.

In *Hirabayashi* v. *United States,* 320 U. S. 81, 92, and again in *Korematsu* v. *United States,* 323 U. S. 214, 217–219, this Court upheld the constitutional validity of blanket curfew and exclusion orders directed to citizens of Japanese ancestry, holding that Congress and the Executive, in the face of threatened danger of enemy

[8] The inadequacy of a prosecution for violation of the 1942 Act in a situation such as this one is self-evident. Petitioner had already been convicted and sentenced to five years' confinement. Further prosecution would not have served to effectuate the purpose of safeguarding against sabotage by removing him from the sensitive coast areas.

attack, had sufficient authority under their power "to wage war successfully"[9] to restrict certain personal liberties of citizens in war zones in order to provide against the danger of espionage and sabotage. It also held that Congress and the Executive had power to delegate that authority to a military commander. The Court further held that whether there was threatened danger of enemy attacks or the possibility of sabotage and espionage in connection therewith was a matter to be determined by the military commander in the proper exercise of his informed judgment, and that his determination would not be disturbed if a rational basis therefor existed. *Hirabayashi* v. *United States,* 320 U. S. at 95, 101, 102, 103–104; *Korematsu* v. *United States,* 323 U. S. at 217, 218.

Here, respondent had determined that the exclusion of petitioner was "dictated by military necessity" (R. 240), having theretofore determined that the Pacific Coast was particularly subject to attack by the enemy (R. 223), a finding that remained in effect until withdrawn (R. 55). Both the district court in the instant case (R. 227) and the district court in the injunction case (R. 272) found as facts that there was a clear and imminent danger of external enemy attack on the Pacific Coast, not only at the time the ex-

[9] Hughes, *War Powers under the Constitution,* 42 A. B. A. Rep. 232, 238.

clusion order was issued but both before and subsequent thereto. The court below took judicial notice of such conditions (R. 327–328). We submit that respondent had reasonable ground for believing that the threat was real and required measures to safeguard the military area from the danger of sabotage and espionage. *Hirabayashi* v. *United States,* 320 U. S. at 94–95. The ends sought to be achieved by the Executive Order and the statute were the prevention of "espionage and sabotage", and exclusion has been held to be an appropriate way to meet these twin dangers. *Korematsu* v. *United States,* 323 U. S. at 217–218.

Consequently, the exclusion order was valid if there was a rational basis for respondent's conclusion that petitioner's mental attitude was such that he might engage in either espionage or sabotage.

The present record shows that such a rational basis did in fact exist. The vulnerability of the Pacific Coast at the time of petitioner's removal, in the face of enemy capabilities at that time, is shown not only by the views of the officers particularly concerned with its security (R. 42–50, 92–96) but also by the affidavit of the Chief of Staff, General of the Army George C. Marshall (R. 58–59). The correctness of these views is confirmed by the findings in the injunction case (R. 272) and in this case (R. 227) and by the holding below (R. 327–328). It is significant

that petitioner does not directly challenge these findings—and in view of his failure to specify them as error he may not now do so. Instead, he simply asserts that no invasion was imminent (Pet. 9, 30–31), relying largely on three district court cases arising on the East Coast at other times and in very different surroundings. Thus, he seeks to substitute his own *ipse dixit,* not only for the informed judgment of those charged with making the military determination, but also for the findings of the courts which have reviewed that determination.

At the time the exclusion order was issued, petitioner had been under investigation for some time. That investigation disclosed that petitioner criticized the war as started for the benefits of the war lords; that he said that the war could be stopped if Mankind United registrants and enrollees would bestir themselves; that Mankind United was going to strike simultaneously in several places, being in a position to stop all manufacture of war equipment and dynamite all ammunition dumps; that the bombing of Pearl Harbor was traced to the White House; and that dimouts and the rationing of oil and gas was to get people used to being dictated to (R. 332–334). It was on this evidence (which in the opinion of the Department of Justice was substantially the same evidence that was before the respondent, R. 255–256) that petitioner was convicted by a jury of conspiracy to

commit sedition. Certainly respondent had sufficient evidence before him to conclude that, in the light of the facts then known to him, the exclusion of the petitioner from the Pacific Coast zones was a proper precautionary measure to take to lessen the risk of espionage and sabotage.

Petitioner does not challenge the correctness of the *Hirabayashi* and *Korematsu* decisions (Pet. 8–9). On the contrary, he attempts to distinguish them on the ground that while they involved mass orders affecting many thousands of American citizens, the loyalty of most of whom was unassailable, it would not have been feasible there to conduct individual hearings; while here there was only one individual involved and that no adequate reason existed for failing to accord him a hearing conforming to all the requirements of a quasi-judicial proceeding (Pet. 9). We submit, however, that those cases are *a fortiori* ones. There loyal citizens were excluded without any hearings; here petitioner, whose disloyalty had been established by the verdict of a jury, was accorded a hearing pursuant to a procedure specifically approved by the Secretary of War (R. 228),[10] an individual exclusion order was issued whose effective date was stayed until its validity had been judicially determined in the injunction case with a holding that it was "legally and constitutionally

[10] The petition (see Pet. 35–36) fails to refer to such approval by the Secretary of War.

valid both from the standpoint of substance and procedure" (R. 282), and its enforcement was not undertaken by respondent until his action had been first expressly approved by the Chief of Staff, the Assistant Secretary of War, and the Secretary of War (R. 265–266.)[11]

Moreover, the question of the exclusion order's

[11] A good deal of the petition is taken up with an attack on the procedure established for the conduct of the exclusion hearings (Pet. 9, 11, 16–20), with assertions that the information against petitioner was not disclosed to him (Pet. 12, 18), and with contentions that respondent's determinations were at no time subject to judicial review (Pet. 10, 31, 32, 33, 36). Petitioner's statements overlook the indisputable facts that he has in two proceedings obtained very exacting and careful judicial review of the reasonableness of respondent's determination (see particularly, Finding XVIII, R. 276–277); they ignore the circumstance that in the injunction case he himself did not contradict the contents of the administrative (i. e., military) file regarding his activities (R. 256); and they are silent as to the findings by the district court in the injunction case that he was apprised of the information against him, other than data as to the sources of such information (R. 276–277), that this limited non-disclosure was justified by public policy (R. 278), and that the exclusion procedure was appropriate to protect the industries, installations, and resources located in Military Areas Nos. 1 and 2 of the Western Defense Command (R. 279). The petition is equally silent as to the holdings in the injunction case that the exclusion procedure was reasonably adapted to the carrying out of respondent's duties and responsibilities (R. 281), and that the non-disclosure of data with respect to the identity of sources of information "was proper, as disclosure would have been harmful to the interests of the United States" (R. 282).

validity has become *res judicata.*[12] In the injunction case the question of the order's validity was placed in issue between the parties hereto and the court found, as a conclusion of law, that the order was valid (R. 281–282). Petitioner appealed and the appeal was later dismissed pursuant to a stipulation that it was "without prejudice to any new or further proceedings arising out of appellant's expulsion from the State of California as involved herein" (R. 289). The appeal was dismissed, not because it was moot but because the parties had stipulated for a dismissal. The order remained in effect. Moreover, while the question of injunctive relief was moot, the question of the validity of the exclusion order was not moot, at least to the extent that petitioner may have desired to rest an action for wrongful removal upon the invalidity of the exclusion order. In such circumstances, petitioner had a right to an appellate review, as otherwise the judgment would be *res judicata. Electric Fittings Co.* v. *Thomas & Betts Co.,* 307 U. S. 241; *Oliver-Sherwood Co.* v. *Patterson-Ballagh Corp.,* 95 F. 2d 70, 71 (C. C. A. 9); certiorari denied, 304 U. S. 573. Cf. *Chicot County District* v. *Baxter State Bank,* 308 U. S. 371; *United States* v. *Moser,* 266 U. S. 236, 241–242; Scott, *Collateral Estoppel By Judgment,* 56

[12] The District Court so held (R. 298–299). The Circuit Court of Appeals did not find it necessary to pass upon this question, as it made an independent determination *de novo* that the exclusion order was valid (R. 338).

Harv. L. Rev. 1. The failure of petitioner to prosecute its appeal in this respect precludes it from again litigating the same question, which has been decided adversely to it.

3. *Respondent is not liable for damages.*—Even assuming, *arguendo,* the invalidity of the order or of the method of its enforcement, respondent cannot be held personally liable in the circumstances of this case. Both by Executive Order and by statute, he had been authorized and directed to take every possible precaution against espionage and against sabotage. It was stated in the Executive Order that the right of any and all persons to enter, remain in, or leave any prescribed military area "shall be subject to whatever restrictions * * * the appropriate Military Commander may enforce in his discretion" (R. 218). The Executive Order further authorized and directed the Military Commander "to take such other steps as he * * * may deem advisable to enforce compliance with the restrictions * * * including the use of Federal troops" (R. 219). Respondent's removal of petitioner through the use of military personnel was specifically and expressly authorized by Secretary of War Stimson, by Assistant Secretary of War McCloy, and by General Marshall (R. 265–266). Moreover, he had been advised both by the Attorney General of the United States and by the Judge Advocate General of the Army

that he could lawfully exercise such power (R. 248, 254). Respondent did not remove petitioner from California to Nevada until petitioner had prosecuted his injunction proceeding in the district court, seeking to enjoin respondent from "directly or indirectly by any means, method or device whatsoever from executing or causing to be executed" the exclusion order here in question (R. 247). The right to use military personnel in carrying out the order had been asserted before the court in the injunction proceeding (R. 256–257). Not until the district court had denied petitioner's suit for an injunction and had given judgment for respondent did the latter proceed to enforcement. Furthermore, as the district court in the present case concluded, respondent "acted in good faith and with the highest motives, and with an honest belief that Executive Order 9066 and Law 503 empowered him to lawfully do and direct" the acts and things for which it is here attempted to hold him liable (R. 299–300).

Similar findings of good faith and reasonableness were made by the district court in the injunction case (R. 278–279, 281–282) and by the circuit court of appeals here (R. 337–338).[18]

[18] In view of those findings, and in the face of other findings that the action here was taken pursuant to legal advice and after express approval by General DeWitt's military and civil superiors (*supra*, pp. 7, 11–12), the statement in the petition (Pet. 31) that "respondent was chiefly interested in an

Accordingly even assuming respondent's lack of authority to remove, we submit that the action taken by him had "more or less connection with the general matters committed by law to his control or supervision" and was not "palpably beyond his authority." *Spalding* v. *Vilas,* 161 U. S. 483, 498. In such circumstances, the law is clear that officials vested with wide power and discretion are, like members of the judiciary, not personally liable either for acts in excess of their jurisdiction or for erroneous ones. *Spalding* v. *Vilas, supra; Jones* v. *Kennedy,* 121 F. 2d 40 (App. D. C.), certiorari denied, 314 U. S. 665; *Cooper* v. *O'Conner,* 99 F. 2d 135 (App. D. C.), certiorari denied, 305 U. S. 643; rehearing denied, 305 U. S. 673, 307 U. S. 651. Cf. *Bradley* v. *Fisher,* 13 Wall. 335, 351–352; *O'Reilly de Camara* v. *Brooks,* 209 U. S. 45, 52.

Where, as here, the issue of necessity has been found in the officer's favor, he cannot be held in damages through the operation of hindsight. *Mitchell* v. *Harmony,* 13 How. 115, 135. And where, as here, every step is taken with the sanction of the officer's superiors, the case is analogous to those decisions which hold that a soldier is not liable in damages if he obeys an order fair on its face. Cf. *Despan* v. *Olney,* 1 Curt, 306,

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assertion of the breadth of military power, rather than in a fear of harm to the country by petitioner" is of course wholly unwarranted.

Fed. Case No. 3822 (C. C. D. R. I., *per* Curtis, J); *United States* v. *Clark*, 31 Fed. 710 (C. C. E. D. Mich.); *In re Fair*, 100 Fed. 149 (C. C. D. Neb.).

CONCLUSION

The case is unique and turns on a question of fact. The principles enunciated below accord with controlling decisions of this Court. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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AUGUST 1947.

APPENDIX

Public Law 503, Act of March 21, 1942, c. 191, 56 Stat. 173, 18 U. S. C., Supp. V, 97a, provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.

Executive Order No. 9066, dated February 19, 1942, 7 Fed. Reg. 1407, provides as follows:

> AUTHORIZING THE SECRETARY OF WAR TO PRESCRIBE MILITARY AREAS
>
> Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense

premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U. S. C., Title 50, Sec. 104):

Now therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restricted areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
February 19, 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942